Supreme Court, U.S.
FILED
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92-1211
NO.

In the
Supreme Court of the United States

OCTOBER, TERM, 1992

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA
Petitioner

VERSUS

CURTIS CAMPO, JR.
Petitioner

AND

ELECTRO-COAL TRANSFER CORPORATION, INC.
Respondent

SECOND PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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2511

QUESTIONS PRESENTED FOR REVIEW

Has the Fifth Circuit in reaffirming the district Court's grant of a directed verdict ignored or misconstrued the mandate of this Court issued on January 13, 1992 vacating the Fifth Circuit's prior decision and remanding Campo for further consideration in light of *Southwest Marine, Inc. v. Gizoni* 112 S.Ct. 486?

Did this Court in vacating the Fifth Circuit's prior ruling in its entirety conclude from the facts recited by the Fifth Circuit from the record that there were indeed substantial issues of fact over which reasonable minds applying the proper legal standard could differ so that trial by jury and not directed verdict was the proper legal method of disposition?

Is petitioner, Curtis Campo, who was denied his right to trial by jury as a matter of law because he was engaged in one of the occupations listed in the Longshore and Harbor Workers' Act pursuant to *Pizzitolo v. Electro-Coal Transfer Corporation*, 812 F.2d 769 which was overruled by this Court in *Southwest Marine v. Gizoni*, 112 S.Ct. 486 *now* entitled to his right to trial by jury?

Did the Fifth Circuit have the discretion to ignore the mandate of the United States Supreme Court?

Did the Fifth Circuit on remand have the discretion to reweigh evidence which had never been presented to the jury so as to to affirm its prior correctness on factual findings and to apply conclusions never considered in its original opinion?

QUESTIONS PRESENTED FOR REVIEW (continued)

Must a claimant who is injured in the service of a specific vessel owned by his employer to which vessel he was assigned for the specific mission of the vessel to perform work which contributed to the mission of the vessel prove attachment to a fleet of vessels under this Court's rulings in *Desper v. Starved Rock*, 72 S.Ct. 807 and *McDermott International v. Wilander*, 111 S.Ct. 807?

Is the Fifth Circuit's relatively new time test of seaman status the *Robison-Barrett* rule (a combination of *Offshore Company v. Robison*, 266 F.2d 769, and *Barrett v. Chevron, U.S.A., Inc.*, 781 F.2d 1067) in conflict with this Court's decisions in *Desper* and *Wilander* or was *Barrett* impliedly overruled by *Wilander*?

LIST OF PARTIES

The following are the parties to this proceeding:

Curtis Campo
Plaintiff-Petitioner

Electro-Coal Transfer Corporation
Defendant-Respondent

National Union Fire Insurance Company
of Pittsburgh, PA
Intervenor-Petitioner[1]

Evangeline M. Vavrick
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New Orleans, Louisiana 70115
Attorney for Plaintiff-Petitioner

Geroge R. Alvey, Jr.
Jones, Walker, Waechter,
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Attorneys for Defendant-Respondent

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[1] American International Group is the parent company of National Union Fire; there are no subsidiaries of National Union Fire.

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TABLE OF AUTHORITIES

Intervenor-petitioner, National Union Fire, adopts the authorities set forth in the Second Petition for Writ of Certiorari filed by plaintiff-petitioner, Curtis Campo, which appear at pages vi and vii thereof.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER, TERM, 1992

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA

Intervenor-Petitioner

VERSUS

CURTIS CAMPO, JR.

Plaintiff-Petitioner

AND

ELECTRO-COAL TRANSFER CORPORATION, INC.

Defendant-Respondent

SECOND PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE FIFTH CIRCUIT

The petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on August 28, 1992.

DECISIONS BELOW

The opinions of the United States Court of Appeals for the Fifth Circuit are reported as follows:

Campo v. Electro-Coal Transfer Corp., 970 F.2d 51 (5th Cir. 1992) (Campo II)

Campo v. Electro-Coal Transfer Corp., 955 F.2d 10 (5th Cir. 1990) (Campo I)

and are reproduced in Appendix A and Appendix E, respectively.

JURISDICTION

This Petition seeks review of the second decision of the United States Court of Appeals for the Fifth Circuit entered in this matter on August 28, 1992, on remand by this Court. Petitioner, Curtis Campo, thereafter petitioned the Court for rehearing, and on October 16, 1992, the Court of Appeals denied Mr. Campo's request for rehearing.

This Petition is timely filed pursuant to Rule 13.4 of the Rules of the Supreme Court of the United States. The jurisdiction of this Court to review the Judgment of the United States Court of Appeals for the Fifth Circuit is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Intervenor-Petitioner, National Union Fire, here adopts by reference the "statutes presented for review" portion of the Second Petition for Writ of Certiorari filed by plaintiff-petitioner, Curtis Campo, Jr., appearing at page 2 thereof.

STATEMENT OF THE CASE

The original Complaint of the plaintiff, Curtis Campo, was filed in the United States District Court for the Eastern District of Louisiana on January 25, 1989. The defendant, Electro-Coal Transfer Corporation, answered on

March 22, 1989. National Union Fire intervened in order to assert its lien for workers' compensation benefits paid to or on behalf of Curtis Campo.

The case proceeded to trial with a jury on September 27, 1989, and continued through September 28, 1989. On Motion of defendant, Electro-Coal Transfer Corporation, the District Court entered a directed verdict, holding that Curtis Campo was a longshoreman and not a seaman as had been alleged. On the basis of this holding, the case was dismissed. The District Court's judgment was appealed by the plaintiff, Curtis Campo, to the United States Court of Appeals for the Fifth Circuit, and again National Union Fire intervened. The Court of Appeals affirmed the District Court by its Judgment entered on July 23, 1989. Mr. Campo petitioned for rehearing, which was denied on September 7, 1990.

The plaintiff, Curtis Campo, and intervenor, National Union Fire, filed Petitions for Writs of Certiorari in the Supreme Court of the United States, which granted a writ on January 13, 1992, vacating the decision of the United States Court of Appeals for the Fifth Circuit and remanding the case to said Court for consideration in light of *Southwest Marine v. Gizoni*, 112 S.Ct. 486 (1991).

On remand, the United States Court of Appeals for the Fifth Circuit again affirmed the decision of the United States District Court. The plaintiff-petitioner, Curtis Campo, filed an Application for Rehearing, which was denied on October 16, 1992. The plaintiff-petitioner, Curtis Campo, filed his Second Petition for Writ of Certiorari in this Court on November 27, 1992. Intervenor-petitioner, National Union Fire, hereby files its Second Petition for Writ of Certiorari.

REASONS WHY WRIT SHOULD BE GRANTED AND ARGUMENT

Intervenor-petitioner, National Union Fire, here adopts by reference the reasons why writ should be granted and argument in support thereof found at pages 13 - 25 of the Second Petition for Writ of Certiorari filed by plaintiff-petitioner, Curtis Campo, Jr.

CONCLUSION

Intervenor-petitioner, National Union Fire, files this Second Petition for Writ of Certiorari in order to preserve its right of recovery of benefits paid to or on behalf of plaintiff-petitioner, Curtis Campo, Jr., by National Union Fire pursuant to the provisions of the Longshore and Harbor Workers Compensation Act.

Respectfully submitted:

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ATTORNEYS FOR NATIONAL
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COMPANY OF PITTSBURGH, PA

PROOF OF SERVICE

I, David L. Barnett, attorney for intervenor-petitioner, and a member of the bar of the Supreme Court of the United States, hereby certify that on this day I have served copies of the foregoing Second Petition for Writ of Certiorari on:

Mr. George R. Alvey, Jr.
JONES, WALKER, WAECHTER, POITEVENT, CARRERE & DENEGRE
201 St. Charles Avenue
New Orleans, LA 70170
Telephone: (504) 582-8000
ATTORNEY FOR DEFENDANT-RESPONDENT

Ms. Evangeline M. Vavrick
912 Louisiana Avenue
New Orleans, LA 70115
Telephone: (504) 899-5555
ATTORNEY FOR PLAINTIFF-PETITIONER

by mailing a copy thereof, postage pre-paid and addressed to their respective offices, this 23rd day of December, 1992.

_____

DAVID L. BARNETT

APPENDIX A

Curtis CAMPO,
Plaintiff-Appellant,

v.

ELECTRO-COAL TRANSFER CORP.,
Defendant-Appellee.

No. 89-3738

United States Court of Appeals,
Fifth Circuit.

Aug. 28, 1992.

Worker injured while unrolling barge cargo cover at cargo transfer terminal brought claim under Jones Act. The United States District Court for the Eastern District of Louisiana, Morey L. Sear, J., granted directed verdict for employer on issue of Jones Act seaman status. The Court of Appeals affirmed without opinion, 909 F.2d 1480, and later issued opinion, 955 F.2d 10, holding that worker was foreclosed from seeking Jones Act seaman status since worker was engaged in occupation expressly enumerated in Longshore and Harbor Workers' Compensation Act. Appeal was taken and the Supreme Court, 112 S.Ct. 858, vacated judgment. On remand, the Court of Appeals, Jerry E. Smith, Circuit Judge, held that worker was not assigned to a fleet of vessels, as needed to establish seaman status under Jones Act.

Affirmed.

Evangeline M. Vavrick, New Orleans, La., for plaintiff-appellant.

Kathleen K. Charvet, McGlinchey, Stafford, Cellini & Lang, New Orleans, La., for intervenors Nat. Union Fire Ins. Co. of Pittsburgh, Pa.

George R. Alvey, Jr., Jones, Walker, Waechter, Poitevent, Carrere & Denegre, New Orleans, La., for defendant-appellee.

Lance S. Ostendorf, David L. Barnett, New Orleans, La., for intervenor-Nat'l Union.

On Remand from the Supreme Court of the United States.

Before POLITZ, Chief Judge, SMITH and BARKSDALE, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

This court previously affirmed the district court's entry of a directed verdict against plaintiff Curtis Campo.[1] Our earlier opinion relied upon *Pizzitolo v. Electro-Coal Transfer Corp.*, 812 F.2d 977, 983 (5th Cir.1987), *cert. denied*, 484 U.S. 1059, 108 S.Ct. 1013, 98 L.Ed.2d 978 (1988), the reasoning of which was rejected in *Southwest Marine v. Gizoni*, ___ U.S. ___, 112 S.Ct. 486, 116 L.Ed.2d 405 (1991). The Supreme Court vacated our opinion in *Campo I*, directing us to reconsider in light of *Southwest Marine*. We do so now and affirm on grounds different from those in our prior opinion.

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[1] *Campo v. Electro-Coal Transfer Corp.*, 955 F.2d 10 (5th Cir.1990) (hereinafter *Campo I*) *vacated*, ___ U.S. ___, 112 S.Ct. 858, 116 L.Ed.2d 766 (1992).

I.

Campo was employed by Electro-Coal Transfer Corp. (Electro-Coal) at its cargo transfer terminal on the Mississippi River. He was injured while unrolling a barge cargo cover[2] and brought suit against Electro-Coal under the Jones Act, 46 U.S.C.App. § 688.

After hearing Campo's evidence of his seaman status, the district court directed a verdict in favor of Electro-Coal. The court first held that no reasonable jury could find that Campo was a seaman, as he could not show a permanent assignment to or substantial work on, a fleet of vessels. Relying upon *Pizzitolo,* the court also found that Campo was not a seaman as a matter of law because his job was specifically enumerated in the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 902(3). We affirmed on the basis of the court's second line of reasoning, finding that *Pizzitolo* controlled the outcome. *See Campo I,* 955 F.2d at 12.

II.

[1] *Southwest Marine* overruled *Pizzitolo. Easley v. Southern Shipbuilding Corp.,* 965 F.2d 1, 3 (5th Cir.1992). We therefore must examine that portion of the district court's ruling that did not rely upon *Pizzitolo.* On motions for directed verdict, we consider all of the evidence, not just that which supports the nonmovant's case, in the light and with all reasonable inferences most favorable to the nonmovant. *Boeing Co. v. Shipman,* 411 F.2d 365, 374-75 (5th Cir.1969) (en banc).

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[2] A detailed description of the facts of this case may be found in *Campo I,* 955 F.2d at 11-12.

[2] In order to bring a claim under the Jones Act, Campo must show that (1) he was permanently assigned to a vessel or fleet or performed a substantial part of his work on the vessel or fleet and (2) his work contributed to the mission of the vessel or fleet. *See Barrett v. Chevron, U.S.A.*, 781 F.2d 1067, 1074 (5th Cir.1986) (en banc); *Offshore Co. v. Robison*, 266 F.2d 769, 779 (5th Cir.1959).

[3] Whether the plaintiff relies upon establishing a permanent assignment or substantial work performance, he must show a connection to a vessel or fleet of vessels in order to satisfy the first prong of the *Robison/Barrett* test. *See Buras v. Commercial Testing & Eng'g Co.*, 736 F.2d 307, 310-311 (5th Cir.1984); *Guidry v. Continental Oil Co.*, 640 F.2d 523, 529 (5th Cir.1981)("[t]he key is that there must be a relationship between the claimant and... [an] identifiable group of vessels"), *cert. denied*, 454 U.S. 818, 102 S.Ct. 96, 70 L.Ed.2d 87 (1981). A fleet is "an identifiable group of vessels acting together or under one control. We reject the notion that fleet of vessels in this context means any group of vessels an employee happens to work aboard." *Barrett*, 781 F.2d at 1074.

[4] Campo has failed to identify a group of vessels to which he was permanently assigned or on which he performed a substantial amount of work. Campo describes a six-or seven-thousand-vessel fleet composed of the small number of Electro-Coal vessels, river barges owned by Mid-South Towing, and ocean barges owned by Gulf Coast Transit.

[5] This grouping fails as a fleet for two reasons. First, Campo did not establish common control of these three groups of vessels.[3] Second, Campo was randomly

[3] Counsel for Campo attempted to introduce a promotional film produced by Tampa Electric Company. Counsel never explained to the court

assigned to vessels that entered the terminal, without regard to ownership, and not all of the vessels were owned or controlled by these three companies.[4] It is well established that a large number of variously owned and controlled vessels does not constitute a fleet. *See, e.g., Langston v. Schlumberger Offshore Servs.*, 809 F.2d 1192, 1194 (5th Cir.1987); *Buras*, 736 F.2d at 310; *Guidry*, 640 F.2d at 529.

Since Campo has not shown a relationship to a fleet of vessels, he does not qualify as a Jones Act seaman. The court properly granted a directed verdict in favor of Electro-Coal.

III.

Campo also has raised several evidentiary and procedural points of error. We reject these arguments for the reasons set out in the prior opinion. *See Campo I*, 955 F.2d at 12. The intervention of National Union Fire Insurance is dismissed as moot.

AFFIRMED.

(footnote 3 continued)

that the purpose of this evidence was to prove common control of the vessels owned by Electro-Coal, Mid-South, and Gulf Coast. Nor would the promotional video, without more, have served to establish such common control.

[4] Campo seems to suggest that Electro-Coal controlled all the ships that used its terminal in that it directed the cargo operations. But "control" encompases more than a temporary authority to perform an isolated task on a vessel.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Filed
OCT 16, 1992

No. 89-3738

CURTIS CAMPO,
Plaintiff-Appellant,

versus

ELECTRO-COAL TRANSFER CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

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ON PETITION FOR REHEARING

(October 16, 1992)

Before Politz, Chief Judge, Smith and Barksdale, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.
ENTERED FOR THE COURT:

/s/ J. Smith
United States Circuit Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Filed
AUG 28, 1992

No. 89-3738

D.C. Docket No. CA 89 351G

CURTIS CAMPO,

Plaintiff-Appellant,

versus

ELECTRO-COAL TRANSFER CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

Before POLITZ, Chief Judge, SMITH and BARKSDALE, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendant-appellee the costs on appeal to be taxed by the Clerk of this Court.

August 28, 1992

ISSUED AS MANDATE:

APPENDIX D

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

January 13, 1992

Ms. Evangeline Vavrick
912 Louisiana Avenue
New Orleans, LA 70115

Re: Curtis Campo, Jr.
v. Electro-Coal Transfer Corporation, Inc.
No. 90-722
National Union Fire Insurance Company of Pittsburgh, Pennsylvania
v. Curtis Campo, Jr., et al.
No. 90-956

Dear Ms. Vavrick:

The Court today entered the following order in each of the above entitled cases:

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of Southwest Marine, Inc. v. Gizoni, 502 U.S. -----(1991).

Very truly yours,

/s/ William K. Suter
WILLIAM K. SUTER, Clerk

APPENDIX E

Curtis CAMPO, Plaintiff-Appellant,

v.

ELECTRO-COAL TRANSFER CORPORATION, Defendant-Appellee.
No. 89-3738
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.
July 23, 1990.

Appeal was taken from an order of the United States District Court for the Eastern District of Louisiana, Morey L. Sear, J., which granted directed verdict for employer on issue of Jones Act seaman status. The Court of Appeals affirmed without opinion, 909 F.2d 1480, and subsequently issued opinion with Duhe', Circuit Judge, holding that because worker was engaged in occupation expressly enumerated in Longshore and Harbor Workers' Compensation Act, he was foreclosed from seeking Jones Act seaman status.

Affirmed.

Certiorari granted and judgment vacated, 112 S.Ct. 858.

Evangeline M. Vavrick, New Orleans, La., for plaintiff-appellant.

George R. Alvey, Jr., Edith B. Clement, Jones, Walker, Waechter, Poitevent, Carrere & Denegre, New Orleans, La., for defendant-appellee.

Lance S. Ostendorf, David L. Barnett, New Orleans, La., for intervenor-Nat'l Union.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before WILLIAMS, SMITH and DUHE', Circuit Judges.

DUHE', Circuit Judge.

In this maritime personal injury suit Curtis Campo appeals the district court's grant of directed verdict on the issue of Jones Act seaman status. Finding that Campo is foreclosed from seeking Jones Act seaman status because he is covered under the Longshore and Harbor Workers' Compensation Act (the LHWCA), we affirm.

[1,2] On motions for directed verdict we consider all of the evidence, not just that which supports Campo's case, in the light and with all reasonable inferences most favorable to Campo. If the facts and inferences point so strongly and overwhelmingly in favor of Electro-Coal that reasonable men could not arrive at a contrary conclusion, the directed verdict was proper. However, if there is

substantial evidence opposed to the motion, the motion for directed verdict should have been denied and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury; there must be a conflict in substantial evidence to create a jury question. *Boeing Company v. Shipman*, 411 F.2d 365, 374-75 (5th Cir. 1969).

Campo was employed by Electro-Coal Transfer at its cargo transfer terminal on the Mississippi River. Electro-Coal employees are divided into two categories, the operations division and the harbor boat division. Employees of the harbor boat division are specifically assigned to one of Electro-Coal's four harbor tugs. The operations department personnel board tugs, barges, and special purpose vessels to position barges and to assist the harbor tugs in opening and closing barge roll-top covers used to protect cargo in the barges. Generally, operations department employees are shoreside dock workers whose main function is to facilitate the loading and unloading of cargo.

Campo worked in the operations division as an operator/trainee and spent most of his time operating a continuous bucket unloader, a machine located on the dock and designed to remove cargo from barges. Campo's position required that he conduct general housekeeping duties aboard the barges. Specifically, he had to tie and untie barges during the loading and unloading process, to open and close barge cargo covers, to keep the barges clean, to ensure that the barges did not take on water, to pump ballast, and to maintain the hydraulic winches to which the river barges to be loaded and unloaded are attached. In a 12 hour shift Campo worked with as many as 20 barges and spent as much as 40 percent of the time tying and untying barges. Campo also assisted harbor tugs in making and breaking tows, spotting river barges, and opening roll-top

covers of barges. In his eight years of employment with Electro-Coal, Campo substituted as a deckhand on a harbor vessel only twice. Beyond this, any activity performed by Campo while on any vessel was for the sole purpose of facilitating cargo operations.

[3] Campo was injured when he fell into a barge which was moored at the dock and being prepared to take on cargo. A tug was positioned on one side of the barge, and a line stretched between Campo and the tug was attached to the cover to roll it open. When the cover was opened Campo detached the line and gave it back to the tug's deckhand. As the tug moved away from the barge upon which Campo was standing, it either jostled the barge or Campo misstepped, causing Campo to fall into the barge's hold.

In *Pizzitolo v. Electro-Coal Transfer Corp.*, 812 F.2d 977, 982 (5th Cir. 1987), *cert. denied*, 484 U.S. 1059, 108 S.Ct. 1013, 98 L.Ed.2d 978 (1988), we held that coverage under the LHWCA precluded a finding of Jones Act seaman status. *Williams v. Weber Management Services, Inc.*, 839 F.2d 1039, 1040 (5th Cir.1987). Section 902(3) of the LHWCA defines an "employee" covered under the Act as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker...." Campo's employment duties involved the loading and unloading of cargo, traditional long-shoring activities. *Durr v. Global Marine, Inc.*, 673 F.2d 740, 741 (5th Cir.1982). Because Campo was engaged in an occupation expressly enumerated in the LHWCA, the district court properly granted a directed verdict in favor of the defendant.

[4] We find Campo's remaining arguments unavailing. Campo first contends that the district court abused its descretion by holding the pre-trial conference on the Friday before jury selection began on Monday. However, Campo fails to point to any prejudice resulting from the timing of the pre-trial conference; in addition, if Campo were surprised by what transpired at the conference, his remedy was to have moved for a continuance. Having failed to do so, Campo waived the right to assert this alleged error on appeal.

[5] Campo also contends that the district court abused its discretion in condemning him to pay Electro-Coal's costs for duplicate copies of depositions of its employees taken by Campo. The law is clear that the court's order was proper because the copies were necessarily obtained for use in the case. *See West Wind Africa Line, Ltd. v. Corpus Christi Marine Services Co.*, 834 F.2d 1232, 1237-38 (5th Cir.1988). Campo's two final points, that the court erred in excluding certain evidence and in limiting the consideration of Campo's employment duties to the two years directly preceding the accident, are rendered moot because the court considered all of the evidence before him in granting the directed verdict.

For the foregoing reasons, the judgment of the district court is in all respects

AFFIRMED.